

89-865

U.S. Supreme Court, U.S.

FILED

NOV 29 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1989

MYRNA TRICKEY,

Petitioner,

v.

LARRY COFFMAN,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

WILLIAM L. WEBSTER
Attorney General for the
State of Missouri

BY:

EVANS & DIXON

*KATHI L. CHESTNUT #33358

Special Assistant Attorneys
General

314 North Broadway, 16th Fl.

St. Louis, MO 63102

(314) 621-7755

*Counsel of Record

35114



QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Eighth Circuit Court of Appeals violated the United States Constitution, Amendment XI, when it held that placement of respondent Coffman in the "Special Adjustment Unit" at the Missouri Eastern Correctional Center for a period of greater than ten days violated Mo. Rev. Stat. § 217.375.

PARTIES BELOW

The parties in the Court of Appeals were the Petitioner, Myrna Trickey, and the Respondent, Larry Coffman.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction.....	1
Constitutional Provisions	1
Pertinent Statutory Provisions	2
Statement of the Case	3
Reasons for Granting Petition for Writ of Certiorari...	6
Argument	7
Conclusion	10
Petitioner's Appendix.....	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Pennhurst State School and Hospital, et al. v. Halderman, et al., 465 U.S. 89 (1984)	6, 7, 8, 9
Will v. Michigan Department of State Police, et al., 109 S.Ct. 2304, 105 L.Ed. 45 (1989).....	6, 7, 8, 9

OTHER AUTHORITIES:

28 U.S.C. §1254(1)	1
42 U.S.C. §1983.....	3
Mo. Rev. Stat. §217.375	2, 4, 6, 7
Mo. Rev. Stat. §275.150(1).....	3
Amendment XI, U.S. Constitution	1, 6, 8, 9
Amendment XIV, U.S. Constitution.....	1

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit was filed on August 28, 1989, and is reported as *Coffman v. Trickey*, 884 F.2d 1057 (8th Cir. 1989). A Petition for Rehearing by panel and Suggestion for Rehearing En Banc was denied on October 12, 1989.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on August 28, 1989. Petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc was denied on October 12, 1989. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

1. United States Constitution, Amendment XIV provides in pertinent part:

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. United States Constitution, Amendment XI provides as follows:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

PERTINENT STATUTORY PROVISIONS

Mo. Rev. Stat. 217.375 states as follows:

Adjustment Units and Administrative Segregation Units, used when - hearing is required - access to medical personnel permitted.

1. An inmate who has violated any rule or regulation of the division or institution relating to the conduct of inmates may, after proper hearing and upon order of the chief administrative officer of the institution, be confined in an adjustment unit for a period not to exceed ten (10) days.
2. When it is determined by the chief administrative officer of an institution that an inmate is an immediate security risk, or an inmate is violent, struggling and creating sufficient disturbance to indicate he is not in control of himself, or an inmate is physically violent, or an inmate is in urgent need to be separated from others for his own safety and that of others, the chief administrative officer of the institution may transfer the inmate to an administrative segregation unit which shall be situated so that the segregation of such inmates from the other inmates of the institution shall be in all respects complete. A hearing shall be held concerning the incident within seventy-two hours.
3. A review hearing shall be held for each inmate detained in administrative segregation

thirty days after the initial period of confinement and every ninety days thereafter. The chief executive officer shall report to the director every ninety days the names of all those inmates confined to administrative segregation, the reason for such confinement, the length of time confined in administrative segregation, and any other information required by the division director.

4. Inmates held in an adjustment unit or in administrative segregation shall have access to medical personnel.

Mo. Rev. Stat. §275.150(1) states as follows:

"Adjustment Unit," cell for the segregation of inmates from the general population because the inmate has been found to have committed a violation of a division or institution rule and other available means are inadequate to regulate an inmate's behavior within acceptable limits; . . . "

STATEMENT OF THE CASE

Respondent Larry Coffman originally brought two separate actions, eventually consolidated, against several defendants under 42 U.S.C. §1983, claiming various constitutional violations during his confinement at the Missouri Eastern Correctional Center in Pacific, Missouri. The Missouri Eastern Correctional Center is a prison operated by the Missouri Department of Corrections and Human Resources. On the first day of trial, Coffman dismissed many of the claims included in the consolidated action. However, on the eve of trial, plaintiff gave notice to defendant that he intended to pursue a new

theory in the case, that theory being that plaintiff's placement in the Special Adjustment Unit at the Missouri Eastern Correctional Center violated due process, as it violated a liberty interest allegedly created by Mo. Rev. Stat. §217.375. The issue and the statute were not raised in plaintiff's complaint. Plaintiff never officially amended his complaint. Over petitioner Trickey's objection, Coffman was allowed to proceed to trial on this theory.

At trial, Coffman challenged both his placement in the Special Adjustment Unit at the Missouri Eastern Correctional Center as violating due process, and also challenged under due process his receipt of a conduct violation for communicating with a non-inmate over a prison fence.

On May 3, 1986, Coffman received a conduct violation written by a correctional officer at the Missouri Eastern Correctional Center, for violation of Rule Number 29, "Violation of Institutional Rules". Conduct at the Missouri Eastern Correctional Center is governed by conduct rules and regulations. When an inmate violates a conduct rule, basic procedures for due process safeguards are followed. Prison officials followed these procedural safeguards in Coffman's case, and Coffman was found guilty of violating institutional rule number 29. He received written notification of the conduct violation, and was read his rights. He then received a hearing from a three member classification team, who recommended referral to the adjustment committee of the prison due to the seriousness of the violation as well as an accumulation of violations. Plaintiff had received numerous conduct violations while at the Missouri Eastern Correctional Center between December 12, 1985 and May 3, 1986. Plaintiff

then had a hearing before an adjustment committee, consisting of three members, and the adjustment committee recommended that he be placed in the "Special Adjustment Unit" of the prison due to an accumulation of violations. Petitioner Myrna Trickey ultimately approved the placement of plaintiff in the "Special Adjustment Unit" at the Missouri Eastern Correctional Center due to an accumulation of violations.

The Special Adjustment Unit of the Missouri Eastern Correctional Center consists of a wing of one of four housing units at the prison within the general population. The unit was developed by the Assistant Director of the Division of Adult Institutions, Steve Long, in 1985 as a response to crowding at the main penitentiary in Jefferson City. The Special Adjustment Unit development was an alternative to transferring maximum security type offenders to the state penitentiary. The goal of the unit is to modify behavior of these offenders. The unit does not provide for total segregation of inmates from the general population, but instead provides additional supervision and security to those inmates.

The case was tried to a jury in September of 1988, and the jury returned a verdict in favor of defendant. Both the issue of fair notice and the issue of the Special Adjustment Unit as violative of due process were submitted to the jury. After the jury verdict, Coffman appealed to the Eighth Circuit Court of Appeals, raising several points of error. Coffman did not file any post-trial motions before going to the Court of Appeals.

The Eighth Circuit Court of Appeals held that Coffman's placement in the "Special Adjustment Unit" violated Missouri law, and specifically Mo. Rev. Stat. §217.375. (P. App. 10). The court held that the "Special Adjustment Unit" of the prison was an "adjustment unit" pursuant to Mo. Rev. Stat. §217.375, and thus placement of inmates in the unit for periods of time greater than ten days violated Missouri law. (P. App. 9-10). The Eighth Circuit made no finding that placement of plaintiff in the Special Adjustment Unit violated due process.

Petitioner Myrna Trickey filed a Motion for Rehearing and Suggestions for Rehearing En Banc, on the grounds that the court's decision to find that the Special Adjustment Unit violated the Eleventh Amendment to the United States Constitution.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

1. In its Opinion, the Eighth Circuit Court of Appeals held that petitioner Trickey violated Mo. Rev. Stat. §217.375.1 by placing respondent Coffman in the Special Adjustment Unit at the Missouri Eastern Correctional Center for a period of more than ten days. In *Pennhurst State School and Hospital, et al. v. Halderman, et al.*, 465 U.S. 89 (1984), this Court held that the Eleventh Amendment to the United States Constitution bars a federal court from deciding whether a state has violated a state statute. In addition, in the case of *Will v. Michigan Department of State Police, et al.*, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), this Court held that a suit against a state official in his official capacity is barred by the Eleventh Amendment.

The decision of the Court of Appeals for the Eighth Circuit in holding that petitioner Trickey violated Mo. Rev. Stat. §217.375.1, in approving the placement of respondent Coffman in the Special Adjustment Unit at the Missouri Eastern Correctional Center is in direct conflict with this Court's decisions in *Pennhurst State School and Hospital, et al. v. Halderman, et al.*, 465 U.S. 89 (1984), and *Will v. Michigan Department of State Police, et al.*, 57 U.S.L.W. 4677 (1989).

ARGUMENT

I.

Whether the Eighth Circuit Court of Appeals violated the United States Constitution, Amendment XI, when it held that placement of respondent Coffman in the "Special Adjustment Unit" at the Missouri Eastern Correctional Center for a period of greater than ten days violated Mo. Rev. Stat. §217.375.

The Eleventh Amendment to the United States Constitutional provides as follows:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In *Pennhurst State School and Hospital, et al. v. Halderman, et al.*, 465 U.S. 89 (1984), this Court considered the question of whether the federal court had subject matter jurisdiction to hold Pennsylvania state officials liable for violations of Pennsylvania state law in a case revolving around the conditions of a Pennsylvania state mental

hospital. 465 U.S. at 92. In *Pennhurst*, this Court held that the federal court lacked jurisdiction by virtue of U.S. Constitution, Amendment XI, to grant injunctive relief against state officials on the basis of state law. 465 U.S. at 124. This court in *Pennhurst* also held that despite the fact that state officials were the named defendants, the case was really only directed against the state officials as nominal parties where the decree would actually operate against the state itself. 465 U.S. at 101. Further, in the case of *Will v. Michigan Department of State Police, et al.*, 109 S.Ct. 2304, 105 L.Ed. 45 (1989), this Court reaffirmed that a suit against state officials in their official capacities is really a suit against their offices and is therefore against the state itself. 57 U.S.L.W. at 4680.

The *Pennhurst* and *Will* decisions are directly contrary to the Court of Appeals' ruling in this case that petitioner Trickey violated Mo. Rev. Stat. §217.375.1 in placing respondent Coffman in the "Special Adjustment Unit" at the Missouri Eastern Correctional Center.

In its decision, the Court of Appeals interpreted the Missouri statute to limit placement of any inmate in the "Special Adjustment Unit" of the prison for a period of greater than ten days. (P. App. 10). In effect, the Court of Appeals prospectively struck down the "Special Adjustment Unit", which is a unit in the Missouri Department of Corrections' prisons where inmates are placed after receipt of an accumulation of violations of prison conduct rules, in order to attempt to rehabilitate their behavior and in order to keep them from having to move to a higher security institution. (P. App. 9). The effect of the court's decision in holding that Trickey violated state law is far reaching and will require revamping of the Missouri

Department of Corrections' classification and housing system for inmates. In holding that Trickey violated state law, the court did not go on to find that Trickey had violated due process, which was the issue briefed and argued by the parties. (P. App. 9-10). The court specifically limited itself to holding that Trickey's actions violated state law.

There is no question that Trickey in approving the placement of Coffman in the "Special Adjustment Unit" was acting in her official capacity and her official capacity only. There is further little question that the effect of the decree by the Court of Appeals will extend to the state of Missouri, and to the Department of Corrections and Human Resources, and not to an individual. As such, the requirements of *Pennhurst* and *Will* are met in all respects. Therefore, the Court of Appeals for the Eighth Circuit had no subject matter jurisdiction to consider the state claims. To hold that Trickey violated Missouri law is in direct contravention of the Eleventh Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of the Appeals for the Eighth Circuit so that this honorable court may review and correct the decision below.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General for the State
of Missouri

BY:

EVANS & DIXON
*KATHI L. CHESTNUT #33358
Special Assistant Attorneys
General for all defendants
314 North Broadway, 16th Fl.
St. Louis, MO 63102
(314) 621-7755

*Counsel of Record

App. 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2520

Larry Coffman,	*
	*
Appellant,	* Appeal from the United
v.	* States District Court
	* for the Eastern
Myrna Trickey,	* District of Missouri.
	*
Appellee.	

Submitted: June 12, 1989

Filed: August 28, 1989

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HENLEY, Senior Circuit Judge.

Larry Coffman appeals from a final judgment entered in the district court upon a jury verdict in favor of defendant Myrna Trickey of Coffman's claim that he was deprived of liberty without due process of law. We reverse and remand for a new trial.

Coffman has been an inmate at Missouri Eastern Correctional Center (MECC) in Pacific, Missouri since December, 1985. While at MECC, Coffman developed a social correspondence with a Wilma Smith, whom he would later marry while still incarcerated. The two had

App. 2

been corresponding for approximately a month, when on May 2, 1986 Smith, who had driven to MECC with the wife of inmate Sam Gunther, attempted to visit Coffman but was unable to do so because she was only on Gunther's and not Coffman's visiting list. That evening, Gunther informed Coffman of Smith's attempted visit and gave him a phone number where he could reach her.

Coffman, as allowed by prison policy, called Smith that night. During the conversation, Smith asked Coffman to be on east end of the prison track the next morning where she could observe him from a church parking lot located outside the prison. On May 3, 1986 Coffman appeared on the prison track, and Smith arrived at the Church parking lot at the time agreed upon. Smith got out of her car and stood in front of it so that Coffman could see her.

The duration of this distant rendezvous, by which the two viewed one another for the first time, was approximately a couple of minutes. Smith then waved as she turned to get back in her car, and Coffman waved back. No verbal communication took place or was possible.

After this event occurred, Corrections Officer William Arledge, who witnessed the event, lodged a charge against Coffman for violating Rule 29 of the Missouri Division of Adult Institution Rules, which prohibits "[k]nowingly failing to abide by any published institutional rule."¹ Coffman was immediately placed in

¹ Arledge's conduct violation report stated:

On the above date and time, I, the reporting officer, saw Resident COFFMAN standing on the East end of

(Continued on following page)

administrative segregation for about four hours before being released. Subsequently, Coffman was brought before a Disciplinary Committee and then an Adjustment Board and found guilty of the charge.

Before each body Coffman admitted committing the foregoing acts but denied any wrongdoing. The Adjustment Board recommended as punishment that Coffman be placed in the prison's Special Adjustment Unit because of Coffman's accumulation of other institutional offenses,² and because Coffman admitted "that this was a planned situation." Defendant Myrna Trickey, the Superintendent of MECC, approved the recommendation and Coffman was placed in the Special Adjustment Unit for ninety days.

(Continued from previous page)

the track. It appeared that he was trying to have a conversation with a lady that was on the church parking lot. I did see him looking right at her and wave. This was also reported by CO/I PARTNEY, Arthur. This placed the resident in violation of Rule #29, VIOLATION OF INSTITUTIONAL RULES.

As can be seen, there is no indication of which institutional rule was broken.

² The other institutional offenses included: taking two pieces of chicken from behind the serving line, visiting another inmate's room during an inmate count, smoking in a nonsmoking area, and possessing sugar and an apple. Coffman also once received a warning for having his cell door shut. The warning apparently was not taken into account by the prison panels, but it was admitted into evidence at trial. The record shows that the warning and two of the foregoing offenses were reported as violations of Rule 29; however, the specific institutional rule that was violated was specified on each of these charges.

App. 4

Coffman brought suit against Trickey, pursuant to 42 U.S.C. § 1983, claiming that she deprived him of his liberty without due process of law, U.S. Const. amend XIV, in that there was no published rule prohibiting what he had done.³ Just prior to trial, Coffman included a second cause of action claiming that his placement in the Special Adjustment Unit for ninety days violated Missouri law which limits the time that an inmate can be confined in such a unit to ten days. *See* Mo. Rev. Stat. § 217.375.1. Over Trickey's objection that the issues had not been pleaded, the issue was allowed to go to trial.

The evidence at trial showed that Coffman and Smith were separated by approximately one hundred yards, two 16-foot tall chain link fences, one with razor wire on top and the other with barbed wire to top, and that a guard tower was stationed almost directly between them. In addition, Coffman tendered into evidence MECC's "Inmate Conduct Rules" and the Missouri Division of Adult Institution's "Inmate Rulebook." Coffman testified, and, when on the stand, Trickey in turn conceded, that nothing in either set of rules prohibited inmates from waving to people on the other side of the fences. MECC's "Inmate Discipline" rule also was admitted which states *inter alia* that inmates will "be advised in writing of [their] rights and responsibilities, conduct prohibited at this institution, and disciplinary sanctions which may be

³ In his complaint, Coffman included Arledge as a defendant, but voluntarily dismissed his claims against Arledge prior to trial. Coffman also brought a second § 1983 suit on August 31, 1987, *Coffman v. Trickey, et al.*, No. 87-1630, which was consolidated with the case *sub judice*. However, before trial Coffman voluntarily dismissed case No. 87-1630.

taken for misconduct of violation of same. This information will be provided in booklet form. . . ."

As part of her case-in-chief, Trickey testified that a number of signs around the institution issue various warnings. First, signs posted on the outermost of the two fences warn outsiders not to communicate with inmates through the fences. Second, signs posted on the innermost fence warn inmates that they will be subject to rifle fire if they approach the fence. Third, a sign outside an airlock entrance to the visiting room instructs inmates not to communicate with visitors through the airlock before entering the visiting room. Coffman in turn testified that, never having had a visitor, he was not aware if there was such a sign. Over Coffman's objection on relevancy grounds, Trickey also offered into evidence and testified about, the visitation rules at MECC. Finally, both sides tendered evidence on the question whether the Missouri statutory ten-day limit on Adjustment Unit confinement applied to MECC's Adjustment Unit and on whether the statute was violated. At no time during the trial did Trickey identify the rule she believed Coffman violated.

At the close of all the evidence, Coffman moved for a directed verdict on both causes of action, which was denied. Coffman also objected to the giving of certain jury instructions, but was overruled. The jury found for Trickey on both counts, and Coffman appealed without filing a motion for judgment *non obstante veredicto*.

Coffman argues that the district court committed four errors, each requiring reversal. Specifically, Coffman claims that the trial court erred by denying his motion for a directed verdict on either (1) his due process claim or

(2) his state statutory claim, and in instructing the jury (3) that Trickey could not be held liable if she reasonably believed in good faith that she was acting pursuant to a valid policy, and (4) that Trickey could not be held liable unless she acted with the intent to violate Coffman's constitutional rights. Trickey argues that the evidence was sufficient to support the jury verdict, that the instructions were not in error or, alternatively, were harmless error, and that, because Coffman never moved for JNOV, the most he can receive from this court is a new trial and not an order for entry of judgment.

We agree with Coffman that the district court should have granted him a directed verdict on his claim that he was deprived of liberty without due process of law when Trickey punished him for conduct that was not proscribed. A fundamental tenet of due process is that to be sanctioned one must have received fair notice that one's allegedly violative conduct was prohibited. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Bouie v. City of Oklahoma*, 378 U.S. 347, 350-51 (1964); see also *Wright v. Arkansas Activities Association*, 501 F.2d 25, 28-29 (8th Cir. 1974). It is beyond cavil that this principle applies within the prison setting. *Gibbs v. King*, 779 F.2d 1040, 1044 (5th Cir.), cert. denied, 476 U.S. 1117 (1986); see *Remmers v. Brewer*, 475 F.2d 52, 54 (8th Cir. 1973) (remanding for a hearing to determine whether prisoner was punished for engaging in legally protected conduct).

Since Coffman was punished for violating a rule which prohibits the violation of a published rule, it was incumbent on Trickey to point to the precise published rule that was violated. Without being coupled to a published rule, Rule 29, standing alone, means nothing or at

least would be void for vagueness. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682-91 (1968); *United States v. Mersky*, 361 U.S. 431, 440-41 (1960). That Coffman's conduct was "a planned situation" does not alter the requirement that Trickey must show that Coffman's conduct knowingly violated a published institutional rule.

In support of her argument that Coffman violated a published rule, Trickey relies on the four rules introduced at trial. Trickey first relies on the signs that warn outsiders not to communicate with inmates through the fence. However, Trickey admitted that these signs face outward and are directed to those outside the prison. Even if Coffman could have been aware of their existence, the signs do not apply to him.

Second, Trickey relies on the signs facing inward that warn inmates that they will be subject to rifle fire if they attempt to approach the fence. It is uncontroverted that Coffman never attempted to approach the fence. Thus, this rule was never violated.

Third, Trickey relies on the sign outside the airlock entrance to the visiting room. Like the other signs, this sign is irrelevant to the facts of this case. Coffman was on the prison track; his pen pal in a church parking lot. He was not about to "proceed[] . . . into the visiting room," to quote Trickey's testimony about the purpose of the sign. This sign is no more applicable to Coffman's "communication" on the track, than it is to his communication by mail or by telephone. Furthermore, it is undisputed that Coffman, never having had a visitor, never saw the sign. Thus, Coffman could not have violated the rule "knowingly," as Rule 29 requires.

Finally, Trickey relies on the MECC visitation rules. These regulations discuss visitation hours, frequency of visits, accessibility to recreation and canteen areas, contact visits, and how an inmate can have a visitor placed on his visiting list so that, as Trickey testified, "[the visitor] can enter the prison." These rules also are irrelevant to the issue here. Trickey conceded this at trial when, in responding to a direct question from the bench, she testified that the visitation rules did not prohibit the conduct for which Coffman was punished. We note Coffman and Smith were not trying to use the visitation room or any of the prison's facilities. Indeed, Smith neither entered the prison, nor trespassed on prison property.

Furthermore, these visitation rules do not purport to govern every form of inmate communication. Like the sign outside the airlock entrance, these rules no more govern this "visit" than they do a telephonic, postal, or furlough "visit." To the extent that they govern innocuous inmate communications with an outsider, the outsider at least must be physically on prison property.⁴ We hold that Trickey failed to identify the published rule that Coffman allegedly violated.

We note that each of Coffman's past Rule 29 conduct violation reports indicated the specific institutional rule that he violated, *see supra* note 2, but that Arledge's report did not, *see supra* note 1. As indicated above, the

⁴ As indicated, the extent of the communication that took place between Coffman and Smith consisted of waving goodbye. Certainly, Coffman and Smith would not view their simple observation of one another as a visit or wish to use it as a substitute for a prison visit.

prison disciplinary panels also failed to cite the rule that Coffman allegedly contravened. Finally, Trickey conceded at trial that each rule that she introduced into evidence or testified about was not really applicable to Coffman's conduct. Never did she cite the specific rule on which she relied when she approved of the punishment. In view of all the evidence, one could not say with any confidence that to this day Coffman knows what rule he violated. Indeed, it is apparent that Trickey does not know. In these circumstances, Coffman's due process right of fair warning could not be satisfied by letting a jury decide on which rule Trickey may have relied. This is particularly true when the jury must pick from four irrelevant rules. We hold that Trickey violated Coffman's constitutional rights by depriving him of liberty without due process of law.

We next turn to Coffman's argument that the district court erred in not granting him a directed verdict on his state statutory claim. As a preliminary matter, we first reject Trickey's argument that this cause of action was not properly before the district court because it was not pleaded. The record shows that a second case filed by Coffman that was consolidated with this one, *see supra* note 3, specifically referenced § 217.375.1, and his trial brief in the case *sub judice* detailed this argument. We hold that Trickey had sufficient notice of this cause of action. *See Greenwood v. Ross*, 778 F.2d 448, 454-56 (8th Cir. 1985) (allowing a party who filed a § 1983 suit for retaliation to proceed on various theories of recovery which had not been pleaded). Thus we proceed to a consideration of the merits.

Section 217.375.1 states that an inmate may not be placed in an adjustment unit for more than ten days. *See* Mo. Rev. Stat. § 217.375.1(1). Trickey, however, argues that the adjustment unit in which Coffman was placed is not governed by § 217.375.1, because the prison has a more restrictive unit in which inmates who commit more serious offenses are confined, and Division Rule 20-1112.010 states that it is this more restrictive unit that is governed by § 217.375.1. In support of her argument Trickey points out and the record shows that in 1986, MECC created a new unit in which to place institutional offenders who could not be timely moved to the overcrowded maximum security prisons. This unit was considered by MECC to be distinct from its more restrictive unit and, thus, not governed by § 217.315.1. Because the statute was considered inapplicable, MECC has not lived by the statute's ten-day limitation.

Clearly, this is a matter of statutory interpretation. When the facts are undisputed, as here, the applicability of the statute's terms are a question of law for the court to decide. *Northern Natural Gas Co. v. O'Malley*, 277 F.2d 128, 137 (8th Cir. 1960). Thus, it was error for the district court to submit this issue to the jury.

We reject Trickey's interpretation of § 217.375.1. It is clear that the Missouri state legislature created two rules for segregating troublesome inmates from the general prison population: one for disciplinary (or punitive) segregation for the confinement of institutional rule

breakers, § 217.375.1(1),⁵ and one for administrative segregation for the confinement of those who pose an immediate security risk, *id.*, subsec. 1(2).⁶ See *Howard v. Armontrout*, 729 S.W.2d 547, 549 (Mo. App. 1987) (*per curiam*).

Under the statute disciplinary segregation is limited to ten days, and for purposes of this case it is of little consequence whether MECC has two or ten different types of disciplinary adjustment units. The adjustment unit in which Coffman was placed is governed by

⁵ Section 217.375.1 (1) reads:

1. An inmate who has violated any rule or regulation of the division or institution relating to the conduct of inmates may, after proper hearing and upon order of the chief administrative officer of the institution, be confined in an adjustment unit for a period not to exceed ten days.

Mo. Rev. Stat. § 217.375.1.

⁶ Section 217.375.1(2) reads:

2. When it is determined by the chief administrative officer of an institution that an inmate is an immediate security risk, or an inmate is violent, struggling and creating sufficient disturbance to indicate he is not in control of himself, or an inmate is physically violent, or an inmate is in urgent need to be separated from others for his own safety or that of others, the chief administrative officer of the institution may transfer the inmate to an administrative segregation unit which shall be situated so that the segregation of such inmates from the other inmates of the institution shall be in all respects complete. A hearing shall be held concerning the incident within seventy-two hours.

§ 217.375.1, and we hold that Trickey violated the statute by placing Coffman in the unit for more than ten days.

Coffman next argues that the district court erred by including an intent element when it instructed the jury on the standard for a constitutional violation.⁷ We agree. Coffman is not required to show that Trickey actually intended to violate Coffman's constitutional rights.

By including such an element when charging the jury, the court misled the jury and misconstrued *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986). These cases held that negligence was not a sufficient standard upon which to hold an official liable for a due process violation. *Daniels*, 474 U.S. at 336; *Davidson*, 474 at 347-48. Otherwise, the fourteenth amendment would become a font for tort law.

In contrast, no one is claiming here that Trickey committed any act negligently. She did not order Coffman confined to the adjustment unit unintentionally, by accident, or through a case of mistaken identity. At the same time, *Daniels* and *Davidson* are not to be cited for the converse proposition that the defendant must have the specific intent to violate the plaintiff's legal rights. See *Holt v. Artis*, 843 F.2d 242, 244 (6th Cir. 1988); *Franklin v.*

⁷ Instruction No. 14 read:

Your verdict must be for defendant Myrna Trickey unless you believe defendant acted with deliberate indifference to plaintiff's constitutional right to due process, by intending to violate plaintiff's constitutional right to due process or by acting in reckless disregard to plaintiff's constitutional right to due process.

Aycock, 795 F.2d 1253, 1261-62 (6th Cir. 1986). Therefore, *Daniels* and *Davidson* are not applicable. See *Davidson*, 474 U.S. at 348; *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *New v. Minneapolis*, 792 F.2d 724, 725-26 (8th Cir. 1986) (*Daniels* and *Davidson* do not apply to "[an] intentional abuse of official power . . . which infringes a specific constitutional guarantee. . . .").

Next, we address the question whether Trickey was entitled to qualified immunity. We discern some continuing confusion on the appropriate analysis to be employed when a court addresses the issue of qualified immunity. The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) "refashioned the qualified immunity doctrine by rejecting any inquiry into an official's state of mind in favor of a wholly objective standard." *Boswell v. Sherbourne County*, 849 F.2d 1117, 1120 (8th Cir. 1988), cert. denied, 109 S.Ct. 796 (1989). That objective standard is whether "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). "[This] is a question of law to be determined by the trial court." *Warren v. City of Lincoln*, 816 F.2d 1254, 1261 (8th Cir. 1987), rev'd on other grounds, 864 F.2d 1437 (8th Cir.) (en banc), cert. denied., 109 S. Ct. 2431 (1989); see also *Boswell*, 849 F.2d at 1120 (whether an official can prevail is a "purely legal question"). In deciding this issue, a court must consider the information upon which the official acted, although this is not to be confused with a review of the official's subjective intent. *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987). "Once a court

determines as a matter of law that a legal standard governing the governmental action at issue was clearly established, [the inquiry ends:] there is no qualified immunity." *Warren*, 816 F.2d at 1261.

In the case *sub judice*, the question whether Trickey enjoyed qualified immunity was submitted to the jury to decide.⁸ This was error. The jury's role is simply to decide if the defendant's conduct actually violated the established legal standard. *Id.*

In the present case, Trickey was not entitled to qualified immunity with respect to Coffman's due process claim. The contours of the right not to be punished for committing a lawful act have been sufficiently established so that Trickey, in charge of a thousand-man high-medium prison, should have known that she was proscribed from punishing Coffman unless his conduct constituted an offense. It is not necessary that her action has been previously held unlawful, but only that, in view of pre-existing law, the unlawfulness of her act is apparent. *Anderson*, 107 S. Ct. at 3039. However, the unlawfulness of Trickey's adverse action in this case is not only apparent from pre-existing case law, *see e.g.*, *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *Moore v. Wyrick*, 766 F.2d

⁸ The jury instruction read:

If the defendant Myrna Trickey believed that she was acting by authority of a valid policy in authorizing plaintiff's placement into the special adjustment unit, and acted in good faith on the basis of this belief, then her reasonable belief and good faith action would constitute a defense to the plaintiff's claim of due process.

1253, 1257 (8th Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986), but similar acts have been proscribed. *See Gibbs*, 779 F.2d at 1045.⁹

Trickey was entitled, however, to qualified immunity on Coffman's statutory cause of action. The record shows that the placing of institutional violators into the adjustment unit more than ten days was an established practice at MECC at the time Trickey became the head administrative officer. We have found no prior cases interpreting this state statute as it applies to the adjustment units. In these circumstances, Trickey objectively had reason to believe that her behavior was lawful. Thus, we hold that while the adjustment unit in which Coffman was placed is in fact governed by § 217.375.1, this was not clearly established at the time Trickey acted.

⁹ The Supreme Court's holding in *Anderson* supports this result. In *Anderson* the issue was whether an "[officer] could establish as a matter of law that a reasonable officer could have believed the search to be lawful." *Anderson*, 107 S. Ct. at 3038. The Court held that in deciding issues of qualified immunity the official must have the opportunity to argue that given the factual circumstances as he or she knew them, the law in the area was not clearly established. *Id.* at 3039. Trickey, of course, has had the opportunity and has made no argument that the circumstances of this case somehow distinguish it from those which established the law.

Furthermore, we note that the underlying premise of *Anderson* was the need for notice so that officials could "anticipate when their conduct may give rise to liability for damages." *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). This fundamental principle, of course, is precisely the issue here and we discern no reason why the person who is being punished is in any less need of fair notice than is the person who is meting out the punishment.

Having disposed of each of the issues presented, we normally would remand the case with instructions to enter judgment for Coffman, consistent with this opinion, and to hold a new trial on the issue of damages. *Total Petroleum v. Davis*, 788 F.2d 476, 480 (8th Cir. 1986). However, as Trickey notes, Coffman failed to move for JNOV below.

By failing to move for JNOV, the trial judge was denied the chance to correct any error by the jury and the most Coffman may obtain from this court is a new trial. See *Johnson v. New York, New Haven, & Hartford R.R. Co.*, 344 U.S. 48, 54 (1952); *Total Petroleum*, 788 F.2d at 480.

Thus, consistent with this opinion, the judgment of the district court is reversed and the case is remanded for a new trial. If the legal issues which we have discussed in this opinion recur on the new trial, our holdings with respect to them will of course be authority binding the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2520EM

Larry Coffman,
Appellant,
vs.

Myrna Trickey,
Appellee.

*
*
* Appeal from the United
* States District Court
* for the Eastern
* District of Missouri.
*
*
*

The suggestion for rehearing en banc filed by appellee Myrna Trickey has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 12, 1989

217.375. Adjustment units and administrative segregation units, used when-hearings required-access to medical personnel permitted

1. An inmate who has violated any rule or regulation of the division or institution relating to the conduct of inmates may, after proper hearing and upon order of the chief administrative officer of the institution, be confined in an adjustment unit for a period not to exceed ten days.

2. When it is determined by the chief administrative officer of an institution that an inmate is an immediate security risk, or an inmate is violent, struggling and creating sufficient disturbance to indicate he is not in control of himself, or an inmate is physically violent, or an inmate is in urgent need to be separated from others for his own safety or that of others, the chief administrative officer of the institution may transfer the inmate to an administrative segregation unit which shall be situated so that the segregation of such inmates from the other inmates of the institution shall be in all respects complete. A hearing shall be held concerning the incident within seventy-two hours.

3. A review hearing shall be held for each inmate detained in administrative segregation thirty days after the initial period of confinement and every ninety days thereafter. The chief executive officer shall report to the director every ninety days the names of all those inmates confined to administrative segregation, the reason for such confinement, the length of time confined in administrative segregation and any other information required by the division director.

4. Inmates held in an adjustment unit or in administrative segregation shall have access to medical personnel.

(L.1982, H.B.No.1196, § A (§ 71).)

Historical Note

Prior Laws and Revisions:	R.S.1949, §§ 217.520 to 217.550
Mo.R.S.A. § 216.455.	R.S.1939, §§ 9104 to 9107.
L.1955, p.318 § A [§ 85].	R.S.1929, §§ 8461 to 8464.
Mo.R.S.A. §§ 217.520 to 217.550	L.1927, p. 363, §§ 1 to 4.

Ch. 217 DEPARTMENT OF CORRECTIONS § 217.155

Library References

Prisons 13.5(1).

C.J.S. Prisons § 19.

DIVISION OF ADULT INSTITUTIONS ORGANIZATION,
POWERS, RESPONSIBILITIES

217.150. Definitions

As used in sections 217.150 to 217.535, unless the context clearly indicates otherwise, the following terms mean:

(1) "Adjustment unit", cell for the segregation of inmates from the general population because the inmate has been found to have committed a violation of a division or institution rule and other available means are inadequate to regulate an inmate's behavior within acceptable limits;

(2) "Administrative segregation unit", cell for the segregation of inmates from the general population for relatively extensive periods of time;

(3) "Chief administrative officer", the chief administrative officer of any division correctional institution, or his designee;

(4) "Division", the division of adult institutions of the department or corrections and human resources;

(5) "Division director", the director of the division of adult institutions, or his designee.

(L.1982, H.B.No.1196, § A (§ 30).)



JAN 25 1990

JOSEPH F. SPANOL, JR.

CLERK

No. 89-865

In The
Supreme Court of the United States
October Term, 1989

MYRNA TRICKEY,

Petitioner,

v.

LARRY COFFMAN,

Respondent.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WILLIAM L. WEBSTER
Attorney General for the
State of Missouri

BY:

EVANS & DIXON

*KATHI L. CHESTNUT #33358

Special Assistant Attorneys
General

314 North Broadway, 16th Fl.

St. Louis, MO 63102

(314) 621-7755

*Counsel of Record



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY COFFMAN,)	
)	
plaintiff,)	
)	
v)	86-1405C(1)
)	
MYRNA TRICKEY,)	
)	
defendant)	

JUDGMENT
(Filed Sept. 8, 1988)

This action came on for trial before the Court and a jury, Honorable William S. Bahn, Magistrate, presiding, and the issues having been duly tried and the jury having rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff her costs of action.

EYVON MENDENHALL, Clerk

/s/ Wanda Sukorsky
Deputy Clerk

Dated September 8, 1988.

No. 89-865

Supreme Court, U.S.
FILED
MAR 14 1990
JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

MYRNA TRICKEY,

Petitioner,

v.

LARRY COFFMAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

GERALD P. GREIMAN
GREEN, HOFFMANN & DANKENBRING
7733 Forsyth Boulevard, #800
St. Louis, Mo. 63105
(314) 862-6800

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

17/12/2



TABLE OF CONTENTS

	Page
Table of Authorities	ii
Additional Statutory Provision.....	iii
Statement of the Case	1
A. Facts.....	1
B. Procedural Background	4
Summary of the Argument	5
Argument	6
A. Trickey's Contention that the Court of Appeals' Holding Regarding R.S. Mo. § 217.375.1 Runs Afoul of the Eleventh Amendment Is Incorrect as a Matter of Law	6
B. Certiorari is Inappropriate for Other Reasons As Well	8
Conclusion	9
Appendix.....	App. 1

TABLE OF AUTHORITIES

Page

CASES

<i>Barr v. Mateo</i> , 360 U.S. 564 (1959)	7
<i>City of Houston, Texas v. Hill</i> , 107 S. Ct. 2502 (1987)	8
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	7
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	7
<i>Hicks v. Oklahoma</i> , 447 U.S. 343 (1980)	6
<i>Papsan v. Allain</i> , 478 U.S. 265 (1986)	7
<i>Shannon v. Recording Industry Association of America</i> , 661 F. Supp. 205 (S.D. Ohio 1987)	7

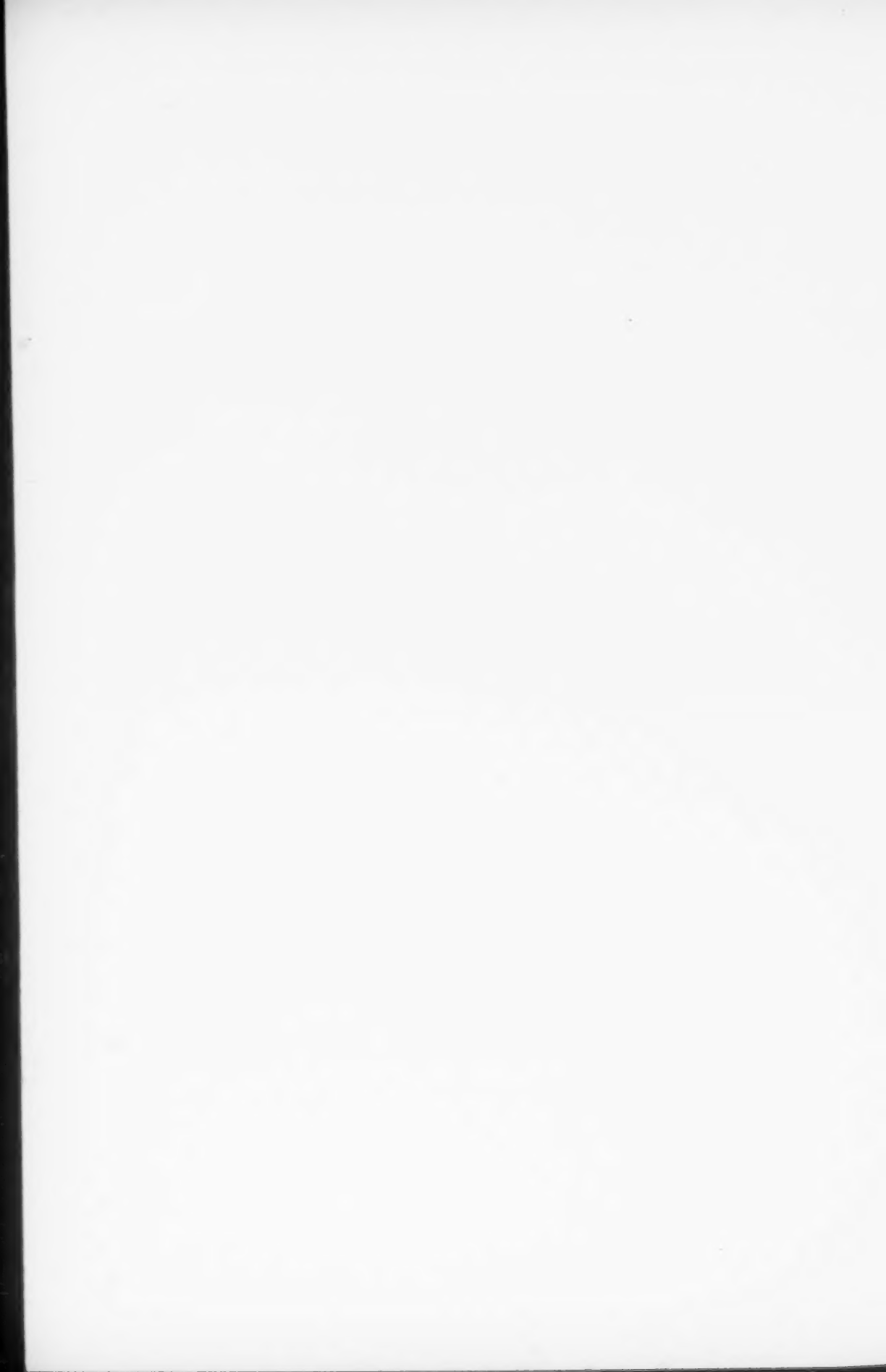
STATUTES

42 U.S.C. §1983	4, 6
R.S. Mo. §217.375.1	3, 5, 6, 8

ADDITIONAL STATUTORY PROVISION

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.



STATEMENT OF THE CASE

A. FACTS

Respondent Larry Coffman is an inmate at the Missouri Eastern Correctional Center ("MECC") in Pacific, Missouri. Coffman has been incarcerated at MECC since December, 1985. He is serving three five-year sentences for sodomy.

Petitioner Myrna Trickey was at all pertinent times the Superintendent of MECC and, as such, a Missouri state employee.

On May 3, 1986, Correctional Officer William Arledge lodged a conduct violation charge against Coffman for allegedly violating published MECC rules. The conduct for which Coffman was charged consisted of standing silently in the prison's exercise yard; looking at an acquaintance, Wilma Smith, who was in a church parking lot on the other side of the prison fences; and waving to her as she drove away.

At the time of the incident, Coffman and Smith were separated by a distance of approximately 100 yards. Between them were two 16 foot tall chain link fences, one of which was topped with razor wire and the other of which was topped with barbed wire. Also, a guard tower was almost directly between Coffman and Smith.

In a telephone conversation the previous day, Coffman and Smith had discussed the timing of when Coffman would be in the exercise yard. At the time of the incident, Coffman had a perfect right to be where he was and Smith had a perfect right to be where she was. Coffman had no knowledge of any rule prohibiting what

he had done. In fact, he had seen other inmates do the same thing without sanction.

Coffman was charged with violating Rule 29 of the Missouri Division of Adult Institution Rules, which prohibits: "Knowingly failing to abide by any published rule." Upon being charged, Coffman immediately was placed in administrative segregation and was kept there for approximately four hours. Subsequently, Coffman was brought before a Disciplinary Committee and an Adjustment Board and found guilty of the charge. As a result, by order of Trickey, Coffman was placed in the MECC's Special Adjustment Unit. Coffman remained confined in the Special Adjustment Unit for 90 days.¹

Coffman suffered severe restrictions on his liberty and other adverse consequences as a result of his placement in the Special Adjustment Unit. For one thing, the Special Adjustment Unit is located in its own wing and is locked off and, thus, segregated from the rest of the institution. Coffman was moved there from his normal room. Also, in contrast to inmates in the general prison population who largely enjoy free movement within the institution and wear normal clothing, Coffman, while in the Special Adjustment Unit, was required to remain in his cell during the week; was required to wear a heavy

¹ Part of the basis given for Coffman's placement in the Special Adjustment Unit was that he had been given three other conduct violations during the preceding several months. The conduct underlying those violations involved taking two pieces of chicken from the kitchen, visiting another inmate's room during the inmate count and smoking in a no-smoking area. Coffman was sanctioned for these incidents at the time they occurred.

jumpsuit at all times, even on extremely hot days; and was denied the same access as other inmates normally have to opportunities for recreation, education, work, visits, and use of the prison law library. In his trial testimony, Coffman characterized the Special Adjustment Unit as a prison within a prison.

Further, Coffman's being found guilty of the charge and his resulting confinement in the Special Adjustment Unit have become part of his permanent prison record, and may adversely affect his chances for parole and his eligibility for transfers and other favorable treatment within the Missouri penal system.

The MECC does not have any published institutional rule proscribing the conduct for which Plaintiff was punished. Significantly, the MECC does have a written rule which provides:

(3) All residents received at Missouri Eastern Correctional Center will be advised in writing of his rights and responsibilities, conduct prohibited at this institution, and disciplinary sanctions which may be taken for misconduct of violation of same. * * *

A Missouri statute limits the period for which a prison inmate may be confined to an adjustment unit on grounds of a rules violation to 10 days. R.S. Mo. §217.375.1:

An inmate who has violated any rule or regulation of the division or institution relating to the conduct of inmates may, after proper hearing and upon order of the chief administrative officer of the institution, be confined in an adjustment unit for a period not to exceed ten days.

B. PROCEDURAL BACKGROUND

Coffman initiated this case *pro se* in July, 1986, under 42 U.S.C. §1983. Thereafter, the undersigned counsel was appointed to represent him. The parties consented to a trial before a United States Magistrate, and the case was tried to a jury in September, 1988.²

At trial, Coffman pursued two distinct claims, both of which were grounded in deprivations of due process. Coffman claimed, first, that he had been deprived of due process by being subjected to punishment for conduct as to which, before he acted, he had no fair notice and warning was proscribed. Second, Coffman asserted that he was further denied due process in that his punishment exceeded the statutory maximum prescribed for the conduct in question.

The jury rendered a verdict for Petitioner Trickey on September 8, 1988, and judgment was entered in her favor the same day. Coffman appealed to the Eighth Circuit, and the undersigned was appointed to also represent him in connection with the appeal.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed and remanded for a new trial. The Court

² This case was originally brought against two defendants, Myrna Trickey and William Arledge; however, Plaintiff voluntarily dismissed his claims against Defendant Arledge prior to trial. Also, in August, 1987, Plaintiff filed a second civil rights action, *Larry Coffman v. Myrna Trickey, et al.*, E.D. Mo., No. 87-1630(C)(1), and by Order dated March 23, 1988, the two cases were consolidated. Plaintiff, however, voluntarily dismissed Case No. 87-1630(C)(1) prior to trial.

held that the trial court should have granted Coffman's motion for a directed verdict on his claim that he was deprived of liberty without due process when Trickey punished him for conduct that was not proscribed. The Court further held that R.S. Mo. §217.375.1 limits confinement in the MECC Special Adjustment Unit to 10 days, as Coffman had maintained, but also held that Trickey was entitled to qualified immunity on Coffman's claim in that regard as a matter of law.³

Trickey's petition for rehearing en banc was denied; and, prior to any proceedings on remand, Trickey sought certiorari.

SUMMARY OF ARGUMENT

Trickey's contention that the Court of Appeals' holding with respect to R.S. Mo. §217.375.1 runs afoul of the Eleventh Amendment is incorrect as a matter of law since the crux of Coffman's claim was a violation of federal, not state law, and the relief sought was damages against Trickey in her individual capacity and equitable relief against the continuing effects of a violation of federal law.

Moreover, even were this Court to question the correctness of the challenged holding, this case is not appropriate for certiorari since the holding may be viewed as

³ In a further holding not relevant to Trickey's present petition, the Court of Appeals held that the trial court erred in including an intent element when it instructed the jury on the requisite showing necessary to make out a constitutional violation.

dictum, Trickey raised the issue in the Court of Appeals belatedly, and, at most, Trickey is seeking mere error correction.

ARGUMENT

A. Trickey's Contention that the Court of Appeals' Holding Regarding R.S. Mo. §217.375.1 Runs Afoul of the Eleventh Amendment Is Incorrect as a Matter of Law

Trickey contends that the Eighth Circuit Court of Appeals violated the Eleventh Amendment in holding that her confinement of Coffman in the MECC Special Adjustment Unit for 90 days violated the 10 day limit on adjustment unit confinement set forth in R.S. Mo. §217.375.1. This contention, however, is incorrect as a matter of law.

Coffman did not pursue any state law claims in this case. The context in which the lower courts were called upon to decide whether Coffman's adjustment unit confinement exceeded the statutory limit was a claim for deprivation of due process under 42 U.S.C. §1983 and the Fourteenth Amendment. Coffman contended that he was subjected to punishment which exceeded the legal maximum for the offense in question, and thereby was denied due process under the teachings of *Hicks v. Oklahoma*, 447 U.S. 343 (1980). (See pp. 10-13 of the Appellant's Brief filed in this case in the Eighth Circuit, reproduced in the Appendix to this Brief.) Insofar as the Eighth Circuit characterized the claim as one resting on state rather than

federal law, it was due to an incorrect and unfortunate choice of words.

We note that, notwithstanding the Eighth Circuit's choice of words, it is not at all clear that the Court of Appeals, in fact, regarded the claim as one turning on state rather than federal law. The Court of Appeals proceeded to take up Trickey's asserted immunity defense and ultimately sustained it as a matter of law, applying the qualified immunity test articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). If Coffman's claim were regarded as one turning on state law, the appropriate immunity test would have been the absolute immunity test discussed in *Barr v. Mateo*, 360 U.S. 564 (1959). See, e.g., *Shannon v. Recording Industry Association of America*, 661 F. Supp. 205, 212 (S.D. Ohio 1987). The fact that the Court of Appeals applied the *Harlow* test suggests that it recognized Coffman's claim as a federal claim.

Viewing the claim in question as a federal law claim, Trickey's Eleventh Amendment argument rapidly begins to crumble. It is well settled that the Eleventh Amendment begins to fade from the picture when the claim is grounded in federal rather than state law. See, e.g., *Papsan v. Allain*, 478 U.S. 265, 276-77 (1986); *Ex parte Young*, 209 U.S. 123 (1908). Moreover, the Eleventh Amendment evaporates from the scene completely when the relief sought in vindication of a federal claim is either damages against a state official in his or her individual capacity, or injunctive relief to remedy ongoing violations of federal law. *Id.*

As noted, Coffman's claim in this case was grounded in federal, not state law. Moreover the remedies sought

were damages from Trickey in her individual capacity, and expungment to remedy the ongoing effects of the due process violation. Accordingly, this case falls squarely outside the proscriptions of the Eleventh Amendment.

B. Certiorari is Inappropriate for Other Reasons As Well.

Even were this Court to question the correctness of the Eighth Circuit's decision, there are a number of other considerations which make certiorari inappropriate.

For one thing, the Eighth Circuit went on to hold that Trickey was immune from liability on the claim in question. Accordingly, the challenged holding regarding R.S. Mo. §217.375.1 may be regarded as dictum.

Further, Trickey's petition may be regarded as premature since the Eighth Circuit's decision contemplates proceedings on remand, and the decision sought to be reviewed, therefore, is not a final disposition.

- In addition, Trickey raised her Eleventh Amendment contention at the Court of Appeals level only in her petition for rehearing; no mention of it was made in her brief on appeal. While this factor may not absolutely bar the present petition, it does serve to weaken her position in this Court. *See, City of Houston, Texas v. Hill*, 107 S. Ct. 2502, 2512 (1987).

Finally, we submit that the petition, at most, presents an effort to obtain simple error correction and does not square with the considerations governing review on certiorari set forth in Supreme Court Rule 17.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

GREEN, HOFFMANN & DANKENBRING

GERALD P. GREIMAN

Attorneys for Respondent

7733 Forsyth Blvd., Suite 800

St. Louis, Missouri 63105

(314) 862-6800



IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2520-EM
CIVIL

LARRY COFFMAN,
Plaintiff/Appellant,

v.

MYRNA TRICKEY,
Defendant/Appellee.

Appeal from the
United States District Court for the
Eastern District of Missouri,
Eastern Division

APPELLANT'S BRIEF

GREEN, HOFFMANN &
DANKENBRING
Gerald P. Greiman
7733 Forsyth Boulevard
Suite 800
Clayton, Missouri 63105
314/862-6800
Counsel for Appellant

III. THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT FOR PLAINTIFF AS TO LIABILITY ON THE BASIS THAT HIS CONFINEMENT IN THE SPECIAL ADJUSTMENT UNIT FOR 90 DAYS VIOLATED R.S. MO. §217.375 AT A MATTER OF LAW.

One of the claims asserted by Plaintiff was that his confinement in the Special Adjustment Unit contravened due process in that it exceeded the maximum punishment prescribed by statute for the underlying conduct. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343 (1980). As discussed above, R.S. Mo. §217.375.1 limits to 10 days the period for which a prison inmate may be confined in an adjustment unit on grounds of a conduct violation. R.S. Mo. §217.150(1) defines "adjustment unit" to mean

a cell for the segregation of inmates from the general population because the inmate has been found to have committed a violation of a division or institution rule and other available means are inadequate to regulate an inmate's behavior within acceptable limits.

Plaintiff moved for a directed verdict as to liability on this claim at the close of the Defendant's case and again at the close of all evidence. (Tr. Vol. II, p. 64) The Trial Court, however, denied the motion, ruling that whether Plaintiff's confinement in the Special Adjustment Unit was proscribed by the statute raised a jury question. (*Id.*) We submit that this ruling was erroneous and that the Trial Court should have directed a verdict for Plaintiff on liability.

The facts as to the nature and consequences of Plaintiff's confinement in the special Adjustment Unit were undisputed. The only issue present at trial was whether

the statute encompassed the Special Adjustment Unit. Since the facts were undisputed, the determinative issue must have been the proper meaning of the statute; and it is settled that the applicability of a statute's terms to undisputed facts is a question of law for the court. *See, e.g., Stissi v. Interstate and Ocean Transport*, 765 F.2d 370, 374 (2d Cir. 1985).

As to the proper interpretation of §217.375.1, perhaps the first rule of statutory construction is that the words of a statute should be accorded their plain and ordinary meaning. *See, e.g., United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987); *Community Blood Bank v. F.T.C.*, 405 F.2d 1011, 1015 (8th Cir. 1969). By its terms, §217.375.1 applies to adjustment units. By its name, the place where Plaintiff was confined for 90 days undeniably was an adjustment unit. In fact, it was the only unit within the institution called an adjustment unit. (Tr. Vol. II, pp. 49-50) We note that it was Missouri officials, not Plaintiff, who designated the place where Plaintiff was confined as the "Special Adjustment Unit". (Tr. Vol. II, p. 50)

Consideration of R.S. Mo. §217.150, which defines an adjustment unit in terms of segregation of inmates from the general population, similarly buttresses the conclusion that the statute applies to the MECC Special Adjustment Unit. As discussed above, the Special Adjustment Unit is segregated from the rest of the prison, and inmates relegated there are confined to their rooms for the bulk of each week.

Defendant's sole argument at trial as to why §217.375.1 supposedly does not apply to the Special Adjustment Unit was that it also maintains an even more

onerous segregation unit and deems that unit subject to the statute. This argument, however, is unavailing. The fact that MECC has multiple types of adjustment units with different degrees of severity does not mean that the statute cannot be deemed to apply to more than one of them. Nothing in the statute suggests that it was intended to apply only to the most onerous system of punishment maintained at the institution. Significantly, both the Special Adjustment Unit and the MECC's more onerous segregation system are designed to achieve the same purpose - behavior modification. (Tr. Vol. II, pp. 41-43)

In sum, it is readily apparent that the Missouri legislature has mandated a 10 day time limit on confining a prisoner to an adjustment unit as a disciplinary measure. Of course, it is not the province of this Court to second-guess the legislature. Based on all of the foregoing, we submit that R.S. Mo. § 217.375.1 clearly applies to the MECC Special Adjustment Unit, and that the Trial Court should have directed a verdict for Plaintiff on that basis.

* * *

